



DEPARTMENT OF JUSTICE

28 CFR Part 32

[Docket No.: OJP (BJA) 1716]

RIN 1121-AA85

Public Safety Officers' Benefits Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to make the following changes to current regulations implementing the Public Safety Officers' Benefits (PSOB) Act: adopting the World Trade Center (WTC) Health Program's List of WTC-Related Health Conditions (List), the WTC Health Program's standards for certifying that an injury is covered for treatment under the Program, and related regulatory provisions, establishing payment offset provisions between the PSOB Program and the September 11th Victim Compensation Fund, and revising the provisions that define when the statutory presumption of line-of-duty death resulting from certain heart attacks, strokes, and vascular ruptures is rebutted. The proposed changes based on the WTC Health Program's List and related provisions would provide a means for claimants to establish that certain public safety officers with chronic, often latent, health conditions sustained a line-of-duty injury under the PSOB Act. The proposed payment offset provisions are intended to implement statutory amendments to the PSOB Act requiring such offset and to facilitate claims processing. Similarly, the proposed rule implementing the statutory presumption associated with certain heart attacks, strokes, and vascular ruptures is intended to amend the current regulation to conform to recent amendments to the PSOB Act and to improve the processing of such claims.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: Please address all comments regarding this rule by U.S. mail, to: Hope Janke, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, NW, Washington, DC 20531; or by telefacsimile to (202) 354-4135. To ensure proper handling, please reference OJP Docket No. 1716 on your correspondence. Comments may also be sent electronically through <http://regulations.gov> using the electronic comment form provided on that site. An electronic copy of this document is also available at the <http://regulations.gov> website. OJP will accept attachments to electronic comments in Microsoft Word, WordPerfect, or Adobe PDF formats only.

FOR FURTHER INFORMATION CONTACT: Hope Janke, BJA, OJP, at (202) 514-6278, or toll-free at 1 (888) 744-6513.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

The Office of Justice Programs (OJP) does not require commenters to submit personal identifying information (such as your name, address, medical information, etc.) as part of your

comment. However, if you wish to submit such information, but do not wish it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to only partially post that comment) on <http://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

II. Background

A. General

The Public Safety Officers' Benefits (PSOB) Program, 42 U.S.C. 3796 et seq. (established pursuant to the Public Safety Officers' Benefits Act of 1976), is administered by the Bureau of Justice Assistance (BJA) of the Office of Justice Programs (OJP), U.S. Department of Justice. Generally speaking, the PSOB Program provides a one-time financial payment to the statutorily-eligible survivors of public safety officers who die as the direct and proximate result

of personal injuries sustained in the line of duty, as well as educational assistance for their spouses and eligible children.

Alternatively, the PSOB Program also provides a one-time financial payment directly to public safety officers determined to be permanently and totally disabled as the direct and proximate result of personal injury sustained in the line of duty, as well as educational assistance for their spouses and eligible children.

B. Establishing a Line-of-Duty Injury under the PSOB Act and Implementing Regulations

42 U.S.C. 3796(a) authorizes the payment, to statutory survivors, of a benefit of \$250,000, currently adjusted for inflation at \$339,881, when the administering agency determines, under its regulations “that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty.” Similarly, 42 U.S.C. 3796(b) authorizes the agency to pay the same inflation-adjusted benefit, when it determines, under its regulations, that a public safety officer has “become permanently and totally disabled as the direct and proximate result of a personal injury sustained in the line of duty.” The agency has exercised its regulatory authority in regulations published in 28 CFR part 32 defining, among other things, “injury,” “line of duty injury,” and “direct and proximate result of an injury.” Those regulations specify the criteria that must be met in the ordinary course for a claimant to establish that a public safety officer sustained a line-of-duty injury and that the injury caused the officer’s death or permanent and total disability.

Under the definition of injury in 28 CFR 32.3, a claimant must establish that a public safety officer sustained a “traumatic physical wound (or a traumatized physical condition of the body) directly and proximately caused by external force.” Under definitions related to causation

in 28 CFR 32.3 (defining direct and proximate result of an injury and substantial factor), a claimant must also establish that the injury was the “substantial factor” in the officer’s death or disability. “A factor substantially brings about a death, injury, [or] disability” if it was sufficient in and of itself to cause the death, injury, or disability, or no other factor (or combination of factors) “contributed to the death, injury, [or] disability . . . to so great a degree as it did.” 28 CFR 32.3 (defining substantial factor). Taken together, these regulations require that a claimant seeking benefits establish an injury, i.e., a traumatic physical wound or traumatized physical condition of the body directly and proximately caused by an external force or other agent, e.g., chemicals, as well as a death or disability, and a direct and proximate causal nexus between the injury and the death or disability.

In PSOB claims involving acute injuries caused by readily identifiable external forces such as a gunshot, motor vehicle accident, or other trauma with death occurring simultaneously or closely following injury, a claimant’s burden in establishing the injury and causal link between injury and death may be straightforward and readily demonstrated. In such cases, a death certificate or an autopsy is generally sufficient to establish a traumatic wound or traumatized condition, the external force that caused the wound or condition, the officer’s death, and a direct and proximate causal link between the injury and death.

In PSOB claims asserting injury or death resulting from exposure to unspecified toxins or hazards associated with line-of-duty activity, however, an autopsy may not sufficiently identify the mechanism of the injury, or adequately establish the direct and proximate causal link between the injury and the death (or permanent and total disability) necessary to support the approval of a claim under the PSOB Act. In such claims, more detailed medical evaluation may be required, and substantial medical evidence may need to be gathered and produced before

PSOB determining officials may make the necessary findings to find the PSOB Act standards are met. For example, an autopsy usually is not sufficient evidence when the claims are based on the chronic, often latent, illnesses and conditions of 9/11 first responders; e.g., respiratory disorders and certain cancers. Similar burdens in gathering, producing, and evaluating medical evidence exist for 9/11 first responders claiming to be permanently and totally disabled as a result of exposure to unidentified toxins or hazards encountered in responding to the September 11, 2001, terrorist attacks.

C. Establishing Injury under the James Zadroga 9/11 Health and Compensation Act of 2010

Pursuant to the James Zadroga 9/11 Health and Compensation Act of 2010 (Public Law 111-347), as amended, the World Trade Center (WTC) Health Program, which is administered by the Director of the National Institute for Occupational Safety and Health (NIOSH), within the Centers for Disease Control and Prevention (a component of the U.S. Department of Health and Human Services), provides medical monitoring and treatment for WTC Health Program members with certain health conditions that are certified as related to the unique circumstances of the 9/11 explosions, ensuing conflagrations, and clean-up (9/11 disaster).¹ In so doing, the Administrator of the WTC Health Program has an advisory committee including medical and scientific experts appointed to review and consider the latest research on connections that may exist between various medical conditions and exposure to the 9/11 disaster. The Administrator of the WTC Health Program may seek guidance and recommendations from these medical and

¹ The James Zadroga 9/11 Health and Compensation Act of 2010 was amended by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) (The James Zadroga 9/11 Health and Compensation Reauthorization Act) (available at gpo.gov).

scientific experts, in determining whether to propose adding conditions to the List of WTC-Related Health Conditions through rulemaking.

The List of WTC-Related Health Conditions is a list of illnesses or health conditions that, pursuant to an examination by a medical professional with expertise in treating or diagnosing the listed conditions, may be found to be related to a WTC Health Program member's exposure to airborne toxins, any other hazards, or any other adverse conditions resulting from the September 11, 2001, terrorist attacks. That a WTC Health Program member has a health condition or illness on the List of WTC-Related Health Conditions does not, by itself, establish that such health condition or illness was related to the 9/11 disaster and, therefore, is eligible for treatment in the WTC Health Program. Rather, the WTC Health Program also makes a specific decision as to whether a particular WTC Health Program member's exposure to the toxins, hazards, or other adverse conditions associated with the 9/11 disaster was "substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition." 42 U.S.C. 300mm-22(a)(1)(A)(1). By law, such decision is based on an assessment of: (1) the individual's exposure to airborne toxins, any other hazard, or any other condition resulting from the terrorist attacks; and (2) the type of symptoms and temporal sequence of symptoms. 42 U.S.C. 300mm-22(a)(2). Together, the List of WTC-Related Health Conditions and individual assessment as to exposure and symptomatology comprise the general and specific findings that the WTC Health Program makes in establishing that a WTC Health Program member's particular illness or health condition is related to the 9/11 disaster.

D. Fatal heart attacks, strokes, and vascular ruptures under 42 U.S.C. 3796(k)

To establish eligibility for death benefits under the PSOB Act, claimants must establish that a public safety officer suffered a personal injury in the line of duty that directly and

proximately caused the officer's death. This statutory requirement excluded from coverage those conditions caused by stress and strain and occupational disease, such as practically speaking, most heart attacks and strokes.

The Hometown Heroes Survivors' Benefits Act of 2003 (Public Law 108-182) (Hometown Heroes Act) amended the PSOB Act by creating a statutory presumption in 42 U.S.C. 3796(k) of death by a line-of-duty injury, which may be rebutted by "competent medical evidence to the contrary," in cases where a public safety officer dies of heart attack or stroke while engaging in, (or within 24 hours of engaging in) "nonroutine stressful or strenuous physical [line-of-duty] activity." Implementation of the rebuttal language has proved challenging for OJP. In fact, the House Judiciary Committee in 2012 noted that "[one] particular term introduced into the PSOBA in 2003, 'competent medical evidence to the contrary,' has not proven workable as introduced."²

In 2006 and 2008, OJP published final rules implementing the Hometown Heroes Act. The 2008 rule provided that the presumption attaches "unless it . . . is overcome by competent medical evidence to the contrary, when evidence indicates to a degree of medical probability that extrinsic circumstances, considered in combination (as one circumstance) or alone, were a substantial factor in bringing the heart attack or stroke about."³ The rule defined extrinsic circumstances as "[a]n event or events; or . . . [a]n intentional risky behavior or intentional risky behaviors." Thus, under regulations implementing the previous presumption, the presumption was rebutted when competent medical evidence of record established that an event(s) or

² H.R. Rpt. 112-548 at 14 (June 25, 2012).

³ 28 CFR 32.13 (defining *Competent medical evidence to the contrary*).

intentional risky behavior(s)⁴ (as defined in the regulations) were the substantial factor in an officer's fatal heart attack or stroke.

OJP's experience is that consideration of cardiovascular disease risk factors and the concept of "risky behavior" have largely proven unworkable. In practice, medical examiners, even with a complete medical record, are rarely able to determine with medical precision whether an inadequately treated cardiovascular disease risk factor(s) was the substantial factor in the officer's fatal condition. As a result, the PSOB Program has expended significant time and resources on inconclusive results, i.e., claims in which a recognized cardiovascular disease risk factor is found to have somehow contributed to the officer's fatal condition but not to the degree that it rebutted the presumption. OJP's conclusion that the current interpretation is unworkable is further reflected in the low numbers of claims it has denied based on "risky behaviors." Despite routinely seeking from claimants additional medical evidence and engaging in time-consuming independent medical review of such evidence, from Fiscal Year 2011 to date, BJA denied at the PSOB Office level less than 1% of all Hometown Heroes claims determined on the basis that an officer's "risky behaviors" were a substantial factor in bringing about the heart attack, stroke, or vascular rupture.

In January 2013, the Dale Long Public Safety Officers' Benefits Improvement Act of 2012 (Section 1086 of Public Law 112-239) (Dale Long Act) amended the rebuttal language in section 3796(k). As amended, the presumption is rebutted when "competent medical evidence establishes that the [public safety officer's] heart attack, stroke, or vascular rupture was unrelated

⁴ In general, "risky behavior" was defined as (1) an officer's failure to undertake treatment, without reasonable excuse, of any known commonly accepted cardiovascular disease risk factor exceeding minimum high-risk levels or of diseases associated with increased risk of cardiovascular disease, or where certain biological relatives had a history of cardiovascular disease, (2) consumption over certain levels of cigarettes or alcohol, and (3) use or abuse of certain controlled substances associated with increased risk of cardiovascular disease.

to the [officer's] engagement or participation or was directly and proximately caused by something other than the mere presence of cardiovascular-disease risk factors.” As the amendment repealed the statutory language upon which OJP regulations implementing the presumption are based, e.g., *Competent medical evidence to the contrary*, such regulations are now obsolete.

III. Provisions of the Proposed Rule

A. Adoption of the WTC Health Program's List of WTC-Related Health Conditions and Standards

Because of the medical and scientific evaluation that informs the List of WTC-Related Health Conditions (List), BJA proposes to use the List as a means for streamlining its own claim-specific evaluation, where a claim for PSOB Program benefits is based on a medical condition (not otherwise excluded from coverage under the PSOB Program) included in the List. Similarly, BJA also proposes, consistent with the law, regulations, policies, and procedures governing the WTC Health Program's certification of an individual's injuries as covered for treatment under the Program, and in conjunction with the List, to assess the individual public safety officer's exposure to toxins, hazards, and other adverse conditions resulting from the terrorist attacks as well as the type of symptoms and temporal sequence of symptoms. Under the proposed rule, BJA will independently use the WTC Health Program's "standards" for certification, which includes the Program's regulations, policies, and procedures, to establish an injury under the PSOB Act.

The proposed rule would establish a means by which claimants could establish that a public safety officer who suffered physical injury as a result of line-of-duty activity at a 9/11 crash site sustained an injury under the PSOB Act. More specifically, the rule would adopt the

WTC Health Program standards for establishing injury or illness for public safety officers who responded to the 9/11 disaster based on the medical and scientific evidence underlying those standards and to promote consistency in the process for determining claims resulting from exposure to a 9/11 crash site. Under the proposed rule, evidence demonstrating that a public safety officer (1) performed line-of-duty activity at a 9/11 crash site, (2) was diagnosed with a physical illness or condition on the List of WTC-Related Health Conditions as defined in 42 CFR part 88, (3) whose physical injury was directly and proximately caused by an illness or condition on the List, and (4) whose exposure to the hazards, toxins, and adverse conditions of the 9/11 disaster are found by the PSOB determining official to be substantially likely to have been a significant factor in aggravating, contributing to, or causing the responder's health condition, would establish an injury for purposes of the PSOB Act. Consistent with the VCF, which payments are treated by law as duplicative of PSOB Program payments and required to be offset, 42 U.S.C. 3796(f)(3), a claimant's injury would be limited to "physical harm" as defined 28 CFR 104.2(c).

BJA proposes to adopt the List of WTC-Related Health Conditions (other than mental health conditions) because these are illnesses or health conditions for which exposure to airborne toxins, any other hazard, or any other adverse condition resulting from the September 11, 2001, terrorist attacks, have been found by another federal program to potentially be related to 9/11 exposures. Because the PSOB Program already excludes mental health conditions from its coverage, the proposed rule would not extend its application to any mental health conditions on the List.

In addition, the adoption of the List and the WTC Health Program standards for assessing injury is warranted based on the unique circumstances associated with the response to the 9/11

disaster, the chronic, often latent, nature of health conditions linked to the response, and the rigorous evidentiary burden faced by PSOB claimants in establishing an injury under current regulations implementing the PSOB Act. PSOB claimants would still be required to satisfy the statutory requirement that such injury have been the direct and proximate cause of the public safety officer's death or permanent and total disability.

The proposed rule would cover those circumstances in which a claimant lacked a WTC Health Program certification or its equivalent, e.g., a determination by the Victim Compensation Fund that an individual's injury was eligible for compensation, that a public safety officer's 9/11 exposure is substantially likely to have been a significant factor in aggravating, contributing to, or causing a particular health condition. The proposed rule would also codify OJP's interpretation that its current regulations providing that a PSOB determining official may consider the factual findings of a public agency, 28 CFR 32.5(b), enable the PSOB Program to accept as evidence of a line-of-duty injury a "certification" by the WTC Program Administrator, as defined in 42 CFR 88.1, or its equivalent, that a particular public safety officer's exposure to airborne toxins, any other hazards, or any other adverse conditions resulting from the September 11, 2001, terrorist attacks is substantially likely to be a significant factor in aggravating, contributing to, or causing the condition.

This regulatory approach would promote the efficient resolution of issues related to injury (and in some cases, causation) without the need for the PSOB Program to conduct an individual review and investigation of the available medical literature in every claim associated with a 9/11 injury. It would promote consistency in federal decision making by allowing the complex medical decisions of another federal program (the WTC Health Program) to streamline the PSOB Program's own evaluation of the same medical issues. It also would lessen the burden

on claimants who otherwise may face significant challenges in obtaining and producing significant medical documentation necessary to establish an injury.

Under the proposed rule, the PSOB Program would rely upon and apply the List and WTC Health Program standards to its independent determination of injury only where the claimant otherwise has established all of the applicable elements normally required for a PSOB claim; e.g., proof of status as a public safety officer and line-of-duty activity.

To maintain consistency with the September 11th Victim Compensation Fund of 2001 (VCF), as amended,⁵ the proposed rule would incorporate certain relevant definitions found in the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347, as amended, and definitions found in implementing regulations: “Physical harm, and “WTC-related health condition.” In particular, OJP proposes to adopt the physical harm provision, which requires that the physical condition upon which the claim of injury is based was treated by a medical professional and may be verified by medical records that were created by or at the direction of the medical care provider, for purposes of maintaining the integrity of the PSOB Program.

B. Prohibition against Duplicate (Dual) Payments

The 2013 amendment to the PSOB Act established, in the PSOB Act itself, a limitation on payments by declaring that benefit payments made under the PSOB Act are in addition generally to any other benefit except payments under the VCF. 42 U.S.C. 3796(f)(3). Therefore, OJP proposes to add a new provision in 28 CFR 32.6, describing how and when the PSOB

⁵ The September 11th Victim Compensation Fund of 2001 was amended by the by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) (The James Zadroga 9/11 Victim Compensation Fund Reauthorization Act) (available at gpo.gov).

Program would pay benefits under the PSOB Act to persons who have received payments from the VCF.

Under the proposed rule, no death or disability benefits under the PSOB program would be payable when the VCF has made payments to or with respect to a public safety officer that are equal to or exceed the amount of such benefits payable under the PSOB Act. To account for circumstances when a PSOB claimant has a pending claim for VCF benefits, or the VCF has made payment to a PSOB claimant that is less than the amount payable under the PSOB Act, the proposed rule would clarify that nothing in the PSOB Act or the rule itself precludes payment of PSOB benefits before the VCF makes payment of compensation. In so doing, the PSOB Program could pay benefits to VCF claimants without waiting for the VCF to issue its payments. To prevent overpayments and ensure the offset is applied, before the PSOB Program pays any benefits based on injuries sustained in the 9/11 disaster, it would verify with the VCF the amount of any payments made or payable to a VCF claimant.

The proposed rule would also clarify that the offset does not extend to educational assistance payable under the PSOB Act, 42 U.S.C. 3796d – 3796d-7. When viewed in the context of a statutory scheme providing for the payment of a particular one-time death or disability benefit, the agency believes that the ordinary meaning of “the benefit payable under this subchapter” suggests that the scope of the offset is limited to the death and disability benefit payable under 42 U.S.C. 3796. However, under current regulations that were promulgated before the offset statute was enacted, educational assistance may, with one exception, be paid only when PSOB Program death or disability benefits have been paid. As OJP has determined the offset does not extend to educational assistance, the proposed rule would revise the definition of “Eligible public safety officer” in current § 32.33 to authorize payment of educational

assistance where death or disability benefits would have been paid but for the operation of the offset in 42 U.S.C. 3796(f).

C. Fatal heart attacks, strokes, and vascular ruptures under 42 U.S.C. 3796(k)

As the Dale Long Act has amended 42 U.S.C. 3796(k), OJP proposes to amend its implementing regulations in 28 CFR 32.13 and 32.14 to reflect the revised statutory language. In implementing revised section 3796(k), the proposed rule would define in proposed § 32.13 the two circumstances when the presumption of death directly and proximately resulting from a line-of-duty injury associated with certain heart attacks, strokes, and vascular ruptures as provided in section 3796(k) is rebutted—i.e., when “competent medical evidence establishes that the [officer’s] heart attack, stroke, or vascular rupture [1] was unrelated to the [officer’s] engagement or participation or [2] was directly and proximately caused by something other than the mere presence of cardiovascular-disease risk factors.”

Under the proposed rule, an officer’s heart attack, stroke, or vascular rupture would be considered as “unrelated to an [officer’s] engagement or participation” if competent medical evidence established that an independent event or occurrence significantly contributed in bringing about the officer’s heart attack, stroke, or vascular rupture. OJP believes that defining this rebuttal factor in terms of “an independent event or occurrence,” that is, something that happens to an officer, appropriately ensures that an off-duty heart attack, stroke, or vascular rupture caused by a clearly unrelated event, such as an off-duty officer’s accident, is not covered by the presumption.

For example, a police officer’s fatal heart attack due to electrocution suffered while performing home repair, established by competent medical evidence, would not be covered by the presumption despite occurring only 12 hours after the officer engaged in a situation involving

nonroutine stressful or strenuous physical law enforcement activity. The heart attack is not covered by the presumption because competent medical evidence establishes that an independent event or occurrence (electrocution sustained while repairing home wiring) separate and apart from the officer's qualifying activity, i.e., engagement in a situation involving nonroutine stressful or strenuous physical law enforcement activity, significantly contributed in bringing about the officer's fatal heart attack. At the same time, such a construction would ensure that an officer's ordinary and routine off-duty activities such as yard work or exercise, that take place following qualifying, on-duty engagement or participation, would not be evaluated for their contribution to the officer's fatal heart attack, stroke, or vascular rupture.

Turning to the other rebuttal factor in the proposed rule, an officer's heart attack, stroke, or vascular rupture would be considered to be caused by "something other than the mere presence of cardiovascular-disease risk factors" when competent medical evidence establishes that the officer's heart attack, stroke, or vascular rupture was directly and proximately caused by the officer's ingestion of controlled substances on Schedule I of the drug control and enforcement laws or the officer's abuse of controlled substances on Schedules II-V of the drug control and enforcement laws. OJP believes that by defining this particular rebuttal factor in terms of intentional behaviors that are well established as adversely affecting cardiovascular health, that exceed the mere presence of cardiovascular disease risk factors, and that are readily attributable to an officer's actions, the proposed rule would appropriately rebut the presumption and preclude payment consistent with the language of the statute.

In addition to implementing the amended statutory language of the presumption, the proposed changes to § 32.13 would reduce the evidentiary burden on claimants seeking death benefits under section 3796(k) and streamline the processing of such claims by reducing the

circumstances under which the PSOB Program would seek expert medical review and additional medical evidence. Towards this end, the proposed rule would eliminate as a basis for rebutting the presumption certain actions of the officer previously defined in regulations as “risky behaviors,” e.g., an officer’s failure to adequately treat known cardiovascular-disease risk factors. OJP believes that eliminating this basis for rebuttal is justified based on its experience implementing the previous regulation which revealed that medical examiners, even with a complete medical record, itself a rare occurrence, were rarely able to determine whether a public safety officer was sufficiently non-compliant with treatment such that it could be said to be the direct and proximate cause of the officer’s fatal heart attack, stroke, or vascular rupture. By omitting from the proposed rule those rebuttal factors which often required the collection and evaluation of extensive medical records as part of an independent medical examination and produced largely inconclusive results, the proposed rule would measurably reduce the burden on claimants and the agency.

Consistent with the amendments to the statutory rebuttal provision, the proposed rule would also eliminate from § 32.13 provisions defining “Competent medical evidence to the contrary,” “Excessive consumption of alcohol,” “Extrinsic circumstances,” “Risky behavior,” and “Undertaking of treatment.” In addition, the proposed rule would eliminate § 32.14(c), requiring the PSOB Office to provide notice to claimants when it determines the existence of competent medical evidence to the contrary. As the statute no longer includes such language, the provision is unnecessary.

IV. Regulatory Requirements

Executive Order 12866 and 13563—Regulatory Planning and Review

This proposed rule has been drafted and reviewed in accordance with Executive Order

12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). As explained below, OJP has assessed the costs and benefits of this proposed rule as required by Executive Order 12866 and has determined that the benefits of the proposed rule justify the costs.

A. Adoption of the WTC Health Program's List and Standards

OJP's experience is that PSOB claimants have been largely unsuccessful in establishing an "injury" for delayed-onset medical conditions or illnesses, particularly cancer. As the proposed rule establishes an evidentiary standard intended for the unique circumstances of public safety officers who sustained an injury related to the 9/11 disaster, OJP estimates that the proposed rule would likely affect all of the 29 claims based on 9/11 injury (27 death/2 disability) currently pending in the PSOB Program without a WTC Health Program certification or its equivalent by enabling these claimants to establish an "injury" under the PSOB Act. Although there are currently 161 total PSOB death and disability claims pending with assertions of injuries based on 9/11 exposure, this estimate pertains only to the 29 claims not covered under OJP's current regulatory authority, as benefits paid through OJP's process of determining PSOB claims based on "certifications" issued by the WTC Health Program Administrator (or equivalent) under 28 CFR 32.5(b) would not be impacted as a result of this regulatory change.

If all 29 such claims were paid, the total PSOB Program death and disability benefit cost

would be \$8,778,198.80. Based on amounts appropriated in FY2016 for PSOB Program death benefits (“such sums as necessary” — estimated at \$71,323,000) and disability and education benefits (\$16,300,000), OJP knows that it could pay the death claims from its current appropriations, and estimates that it could pay the disability claims from its current appropriations. OJP’s estimate does not account for any offset to PSOB Program payments based on VCF payments, which would reduce the amount of PSOB Program payments made; however, OJP is unable to estimate how many of the 29 claims would be approved by VCF. Regardless of whether a PSOB payment were offset by a VCF payment, there is no additional benefit cost, as the amounts that would be required are covered by current appropriations (with respect to death claims) and appear to be covered by such appropriations with respect to disability claims, and, barring unforeseen circumstances, would not exceed such amounts. As PSOB claims based on 9/11 injury would be processed by existing staff, OJP would not incur additional administrative or personnel costs in processing these claims.

B. Provisions implementing the offset at 42 U.S.C. 3796(f)(3)

The primary benefit of the proposed rule is that, pursuant to statute, it permits the PSOB Program to pay benefits to PSOB claimants who are awaiting a decision on eligibility for VCF benefits, pending receipt of VCF payments, or are in receipt of VCF payments less than the maximum PSOB Program death or disability payment. A secondary benefit is that it clarifies that claimants who would be eligible for payment of death or disability benefits under the PSOB Act but for the operation of the offset, would be eligible for educational assistance.

Estimating annual costs for public safety officers’ educational assistance is difficult

because of the nature of the payment.⁶ If all of the 29 currently pending claims based on 9/11 injury and lacking a WTC Health Program certification, or its equivalent, were approved, thereby creating potential eligibility for educational assistance, OJP estimates that the impact could be to add approximately 49 educational assistance claimants for FY2016 and beyond. Using the current maximum monthly payment rate of \$1,021/month, OJP estimates that annual benefit costs could increase by approximately \$450,261, annually (based on 49 claimants completing 9 months of educational assistance payable at the current maximum rate of \$1,021/month).⁷ Based on the amount of funds appropriated for disability benefits and educational assistance in FY2016 (\$16,300,000), OJP estimates that, barring unforeseen circumstances, it could pay these additional education claims from its current appropriation. As PSOB claims based on 9/11 injury would be processed by existing staff, OJP would not incur additional costs in processing these claims.

C. Fatal heart attacks, strokes, and vascular ruptures under 42 U.S.C. 3796(k)

The primary benefit of the proposed rule is the reduced burden on both claimants and the agency in determining claims under 42 U.S.C. 3796(k). In defining the circumstances that warrant rebuttal in terms of readily ascertainable facts, OJP believes that the PSOB Program will, in most cases, be able to rely upon the evidence of injury and death ordinarily submitted with a claim, e.g., a death certificate or autopsy. Based on its experience, OJP estimates that, under the previous regulatory interpretation, it seeks additional evidence from claimants and independent

⁶ The educational assistance benefit is payable only as a reimbursement to spouses and children of eligible public safety officers for eligible educational expenses such as tuition and fees. Further complicating matters related to estimation, eligible children have until they are 27 to complete qualifying coursework and spouses of eligible public safety officers have no age cutoff for completing qualifying coursework. In addition, claimants may submit claims for educational assistance up to six months before attending qualifying coursework, or at any time after a course has been completed. On occasion, the PSOB Program receives a single claim for all 45 months of benefits; however, the majority of claims are submitted on an academic-term by academic-term basis.

⁷ Payments for PSOB educational assistance are calculated on the basis prescribed in 38 U.S.C. 3532 and are subject to increase based on increases in certain consumer price indexes as provided in 38 U.S.C. 3564.

medical review of medical evidence in approximately 50 percent of claims. Under the proposed rule, OJP estimates that the PSOB Program would need to seek additional evidence from claimants and independent medical review of medical evidence in less than 5 percent of claims. As the PSOB Program receives on average approximately 92 claims for benefits under 42 U.S.C. 3796(k) annually, OJP estimates that it would need to seek additional evidence and review in fewer than 1 in 20 such claims, which is significantly fewer than it seeks under the previous rule.

This reduction in evidentiary development is also expected to result in cost savings for medical reviews as well as the costs associated with obtaining medical records for such reviews. For every claim that does not require independent medical review, OJP estimates a savings of \$1,652, which represents the average cost to the program of obtaining certain medical opinions in claims for PSOB Program death benefits from 2009 through 2015. OJP also estimates a savings to the claimant of \$603 for the cost of obtaining medical records (an average of 900 pages in the claims sampled). This estimate is based on the maximum fees permitted by law, which vary by state,⁸ and the number of pages of medical records in claims for PSOB Program death benefits as determined in a random sampling of claims involving medical issues that require a claimant to provide such records. In addition, OJP believes that the streamlined criteria would increase the rate at which such claims are processed, however, it is difficult to quantify any additional cost savings resulting from such efficiencies.

In terms of benefit costs, OJP estimates that there will not be a significant increase in claims approved as compared to the previous regulatory criteria. Accordingly, the proposed rule does not significantly increase benefit costs. And, as these claims would be processed by existing

⁸ See e.g., Joy Pritts, et al., *Privacy and Security Solutions for Interoperable Health Information Exchange: Report on State Medical Record Access Laws*, <https://www.healthit.gov/sites/default/files/290-05-0015-state-law-access-report-1.pdf>; Table A-5, *Overview of State Law: Maximum Fees Doctors and Hospitals May Charge Patients for Copies of Medical Records* <https://www.healthit.gov/sites/default/files/appa5-1.pdf>. (accessed June 16, 2016).

staff, OJP would not incur additional administrative or personnel costs in processing these claims.

This proposed rule would impose no costs on state, local, or tribal governments, or on the private sector.

Although not an economically significant rulemaking under Executive Orders 12866 and 13563, The Office of Justice Programs has determined that this proposed rule is a "significant regulatory action" under section 3(f) of the Executive Order, and accordingly this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 13132—Federalism

This proposed rule would not have substantial direct effects on the States, on the relationship between the federal government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB program statutes provide benefits to individuals and do not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to section 3(b)(1)(I) of the Executive Order, nothing in this proposed rule or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States, except as the same may be contained within part 32 of title 28 of the Code of Federal Regulations.

Regulatory Flexibility Act

The Office of Justice Programs hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons: this proposed rule addresses federal agency procedures; furthermore, this proposed rule would make amendments to clarify existing regulations and agency practice concerning public safety officers' death, disability, and education benefits and would do nothing to increase the financial burden on any small entities. Therefore, an analysis of the impact of this proposed rule on such entities is not required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act of 1995

This proposed rule would impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507.

The proposed rule includes paperwork requirements in three collections of information previously approved by OMB for the PSOB Program. OJP published in the Federal Register on January 11, 2016, a 60-day notice of “Agency Information Collection Activities” for each of the following forms: *Claim for Death Benefits* (OMB Number 1121-0024), *Report of Public Safety Officer's Death* (OMB Number 1121-0025), and *Public Safety Officers' Disability Benefits* (OMB Number 1121-0166). In calculating the burden associated with these forms/collections, OJP reviewed its previous burden estimates and updated these to reflect the time required for claimants to gather the many different documents necessary to establish eligibility for these benefits, e.g., birth certificates, marriage certificates, divorce decrees (where applicable), public

agency determinations as to death or disability benefits, medical records, etc. Information about the proposed collections is as follows:

Claim for Death Benefits - Overview of Information Collection

1. Type of Information Collection: Reinstatement with change of a previously approved collection

2. The Title of the Form/Collection: Claim for Death Benefits

3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: Bureau of Justice Assistance. Office of Justice Programs, United States Department of Justice.

4. Affected public who will be asked or required to respond, as well as a brief abstract:
Primary: Eligible survivors of fallen public safety officers.

Abstract: BJA's Public Safety Officers' Benefits (PSOB) Office will use the Claim Form information to confirm the eligibility of applicants to receive Public Safety Officers' Death Benefits. Eligibility is dependent on several factors, including public safety officer status, an injury sustained in the line of duty, and the claimant status in the beneficiary hierarchy according to the PSOB Act. In addition, information to help the PSOB Office identify an individual is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the claim form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 350 respondents will apply each year. Each application takes approximately 120 minutes to complete. OJP estimates that the total public burden (in hours) associated with the collection can be calculated as follows: Total Annual Reporting

Burden: 350 x 120 minutes per application = 42,000 minutes / by 60 minutes per hour = 700 hours.

Public Safety Officer's Death – Overview of Information Collection

1. Type of Information Collection: Reinstatement with change of a previously approved collection.

2. The Title of the Form/Collection: Report of Public Safety Offices Death.

3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: Bureau of Justice Assistance. Office of Justice Programs, United States Department of Justice.

4. Affected public who will be asked or required to respond, as well as a brief abstract:
Primary: Public safety agencies experiencing the death of a public safety officer according to the PSOB Act.

Abstract: BJA's Public Safety Officers' Benefits (PSOB) Office will use the Report of Public Safety Officer's Death Form information to confirm the eligibility of applicants to receive Public Safety Officers' Death Benefits. Eligibility is dependent on several factors, including public safety officer status, an injury sustained in the line of duty, and the claimant status in the beneficiary hierarchy according to the Act. In addition, information to help the PSOB Office identify an individual is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the report form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 350 respondents will apply each year. Each application takes approximately 240 minutes to complete. OJP estimates that the total public burden (in

hours) associated with the collection can be calculated as follows: Total Annual Reporting Burden: 350×240 minutes per application = 84,000 minutes / by 60 minutes per hour = 1400 hours.

Public Safety Officers' Disability Benefits– Overview of Information Collection

1. Type of Information Collection: Reinstatement with change of a previously approved collection.

2. The Title of the Form/Collection: Public Safety Officer's Disability Benefits.

3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: Bureau of Justice Assistance. Office of Justice Programs, United States Department of Justice.

4. Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Public safety officers who were permanently and totally disabled in the line of duty.

Abstract: BJA's Public Safety Officers' Benefits (PSOB) Office will use the PSOB Disability Application information to confirm the eligibility of applicants to receive Public Safety Officers' Disability Benefits. Eligibility is dependent on several factors, including public safety officer status, injury sustained in the line of duty, and the total and permanent nature of the line-of-duty injury. In addition, information to help the PSOB Office identify individuals is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the application form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 100 respondents will apply each year. Each application takes approximately 300 minutes to complete. OJP estimates that the total public burden (in

hours) associated with the collection can be calculated as follows: Total Annual Reporting Burden: 100 x 300 minutes per application = 30,000 minutes / by 60 minutes per hour = 500 hours.

Unfunded Mandates Reform Act of 1995

This proposed rule would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The PSOB program is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 28 CFR Part 32

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 32—PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFITS CLAIMS

1. The authority citation for 28 CFR Part 32 continues to read as follows:

Authority: 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) & (b), 3795a, 3796c-1, 3796c-2; sec. 1601, title XI, Pub. L. 90-351, 82 Stat. 239; secs. 4 through 6, Pub. L. 94-430, 90 Stat. 1348; secs. 1 and 2, Pub. L. 107-37, 115 Stat. 219.

2. Amend § 32.3 as follows:

a. Amend the definition of *Act* by removing “and Apr. 5, 2006 (designated beneficiaries))” and adding in its place “Apr. 5, 2006 (designated beneficiaries); and Jan. 2, 2013)”.

b. Add definitions of *List of WTC-related health conditions* and *Physical harm* in alphabetical order to read as follows:

§ 32.3 Definitions.

* * * * *

List of WTC-related health conditions means the list of *health* conditions (other than a mental-health condition) listed—

(1) At 42 U.S.C. 300mm-22(a)(3); or

(2) On the List of WTC-Related Health Conditions in 42 CFR part 88.

* * * * *

Physical harm means physical harm as defined at 28 CFR 104.2(c).

* * * * *

3. Amend § 32.5 by adding paragraph (j) to read as follows:

§ 32.5 Evidence.

* * * * *

(j) Physical harm suffered by a public safety officer as a direct and proximate result of a condition on the List of WTC-Related Health Conditions shall be understood to be a line-of-duty injury if, as determined by the PSOB determining official, and pursuant to the standards governing the World Trade Center Health Program’s certification of injuries as covered by the program, such officer’s exposure to airborne toxins, any other hazards, and any other adverse conditions resulting from the September 11, 2001, terrorist attacks is substantially likely to have

been a significant factor in aggravating, contributing to, or causing the illness or health condition.

4. Amend § 32.6 by adding paragraph (f) to read as follows:

§ 32.6 Payment and repayment.

* * * * *

(f)(1) If compensation under the September 11th Victim Compensation Fund of 2001 (49 U.S.C. 40101 note)) has been paid with respect to an injury, the total amount payable under subpart B or C of this part, with respect to the same injury, shall be reduced by the amount of such payment of compensation.

(2) Nothing in paragraph (f)(1) of this section, or in the Act, at 42 U.S.C. 3796(f)(3), shall be understood to preclude payment under this part before the final payment of compensation under such Fund.

(3) Nothing in the Act, at 42 U.S.C. 3796(f)(3), shall be understood to require reduction of any amount payable under subpart D of this part.

5. Amend § 32.13 as follows:

a. Add definitions of *Something other than the mere presence of cardiovascular disease risk factors* and *Unrelated* in alphabetical order.

b. Remove the definitions of *Competent medical evidence to the contrary*, *Excessive consumption of alcohol*, *Extrinsic circumstances*, *Risky behavior*, and *Undertaking of treatment*.

The additions read as follows:

§ 32.13 Definitions.

* * * * *

Something other than the mere presence of cardiovascular disease risk factors means—

(1) Ingestion of controlled substances included on Schedule I of the drug control and enforcement laws (see 21 U.S.C. 812(a)); or

(2) Abuse of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)).

* * * * *

Unrelated—A public safety officer’s heart attack, stroke, or vascular rupture is unrelated to the officer’s engagement in a situation or participation in a training exercise, as described in 42 U.S.C. 3796(k)(1), when an independent event or occurrence significantly contributes in bringing about the officer’s heart attack, stroke, or vascular rupture.

§ 32.14 [Amended]

6. In § 32.14, remove paragraph (c).

7. In § 32.33, the definition of *Eligible public safety officer* is revised to read as follows:

§ 32.33 Definitions.

* * * * *

Eligible public safety officer means a public safety officer—

(1) With respect to whose death, benefits under subpart B of this part properly—

(i) Have been paid; or

(ii) Would have been paid but for operation of the Act, at 42 U.S.C.

3796(f); or

(2) With respect to whose disability, benefits under subpart C of this part properly—

(i) Have been paid; or

(ii) Would have been paid, but for operation of—

(A) Paragraph (b)(1) of § 32.6; or

(B) The Act, at 42 U.S.C. 3796(f).

* * * * *

Dated: June 30, 2016

Karol V. Mason
Assistant Attorney General

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